STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BARRY S. PAIGE	:	SMALL CLAIMS DETERMINATION DTA NO. 820406
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax under Chapter 17, Title 11 of the Administrative Code of the City of New York for the Years 1991 and 1992.	:	

Petitioner, Barry S. Paige, 65-09 99th Street, Rego Park, New York 11374, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 17, Title 11 of the Administrative Code of the City of New York for the years 1991 and 1992.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York on January 11, 2006 at 2:45 P.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Susan Parker).

Since neither party herein elected to reserve time for the submission of post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund for 1991 and a portion of his claim for refund for 1992 on the basis that the claims were filed after the applicable statute of limitations for credit or refund had expired.

FINDINGS OF FACT

1. The Division of Taxation's ("Division") records indicated that petitioner had not filed New York State and City personal income tax returns for the 1991 and 1992 tax years. Accordingly, the Division, in 1995, sent several letters to petitioner requesting that if returns for 1991 and 1992 had been filed, to please send copies of each return along with information regarding any refund received or copies of the canceled check in payment of any tax due. If petitioner had not yet filed returns for 1991 and 1992, he was instructed to submit the returns. Petitioner did not respond to these letters.

2. The Division next mailed to petitioner statements of proposed audit changes, dated April 24, 1995 for 1991 and December 4, 1995 for 1992, wherein it computed his New York State and City personal income tax based on information it had received from the Internal Revenue Service. Both statements of proposed audit changes did not allow petitioner credit for any payments of tax, i.e., tax withheld from wages or estimated tax payments. Each Statement of Proposed Audit Changes advised petitioner to submit wage and tax statements if tax had been withheld from wages or to submit the canceled check or checks if estimated tax payments had been made. Petitioner did not respond to either of the statements of proposed audit changes.

3. Based on the statements of proposed audit changes, the Division next issued to petitioner two notices of deficiency. The Notice of Deficiency for the 1991 tax year was dated June 19, 1995 and asserted that $3,683.00 of New York State and City personal income tax was

due, together with penalty of $1,545.08 and interest of $880.38. For the 1992 tax year, the Notice of Deficiency, dated January 29, 1996, asserted New York State and City personal income tax due of $3,652.00, plus penalty of $1,497.92 and interest of $804.68. Once again, petitioner did not reply to either Notice of Deficiency.

4. When petitioner filed his 1995 New York State and City personal income return in 1996, the Division applied the refund claimed on the return to the outstanding liability for the 1991 tax year. The refunds claimed every year thereafter on petitioner's 1996 through 2000 New York State and City income tax returns were likewise applied to the 1991 liability. Starting in August of 1999, the Division also began to garnish petitioner's wage income from the United States Postal Service. The liability for 1991 was fully paid as of April 17, 2001 and the 1992 liability was satisfied on November 22, 2002, at which time the income execution ceased. The Division collected $16,226.12 via the refund offsets and income execution, which amount represents the total of tax, penalty and interest due on the assessments for 1991 and 1992.

5. On April 13, 2004, almost a year and a half after the 1992 liability was paid and some three years after the 1991 liability was satisfied, petitioner submitted his 1991 and 1992 New York State and City personal income returns, along with duplicate copies of wage and tax statements from the United States Postal Service. The duplicate copy of the wage and tax statement for 1991 revealed that petitioner had $3,716.37 of New York State and City personal income tax withheld from his wages, thus indicating that he had a small overpayment of $33.37 ($3,716.37 tax withheld less $3,683.00 of tax due). For the 1992 tax year, the duplicate copy of petitioner's wage and tax statement shows total tax withheld from wages of $3,630.17, leaving a small balance due of $21.83 ($3,652.00 of tax due less $3,630.17 of tax withheld from wages).

6. Also attached to petitioner's returns for 1991 and 1992 were two forms IT-113-X, Claim for Credit or Refund of Personal Income Tax. The forms IT-113-X sought a refund of the amounts paid on the assessments for 1991 and 1992 via the refund offsets and income execution.

7. On May 7, 2004, the Division issued a Notice of Disallowance to petitioner indicating that he was allowed a refund for the 1992 tax year in the sum of $4,085.66, and that the balance of the payments made for 1992 and all of the payments made for 1991, totaling $12,140.46, were disallowed because the claims for refund were filed beyond the applicable statute of limitations for credit or refund with respect to those payments. The $4,085.66 refund which was allowed represents all of the payments made by petitioner for 1992 within the two-year period, as allowed by Tax Law § 687(a), immediately preceding the April 13, 2004 claim for refund. The $12,140.46 amount disallowed represents payments made by petitioner prior to April 13, 2002, and, as such, deemed by the Division to be beyond the statute of limitations for credit or refund.

8. The Division's records, specifically "Case Contact Inquiry" printouts, reveal that petitioner had called Division personnel regarding the assessments for 1991 and 1992 on at least four occasions. The Case Contact Inquiry printouts, with the first one being dated July 17, 1996, all indicate that petitioner was informed of and understood the need to submit returns for 1991 and 1992 together with wage and tax statements.

SUMMARY OF PETITIONER'S POSITION

9. Initially, petitioner maintains that he mailed, via ordinary first class mail, his 1991 and 1992 New York State and City personal income tax returns to the Division on or before the applicable due dates. Petitioner also asserts that his exemplary record of filing timely income tax returns for years both prior and subsequent to the years in question should weigh heavily in his favor.

10. Petitioner also asserts that when the Division started to garnish his wages he personally visited the Division's Queens District Office where he claims he was told to wait for the assessments for 1991 and 1992 to be fully paid by the income execution before submitting his tax returns and wage and tax statements. While petitioner cannot remember the name of the individual he spoke with at the Queens District Office, he maintains that this person never informed him that there was a statute of limitations for credit or refund. Petitioner argues that the person at the Queens District Office, along with other Division employees, should have advised him that there was a statute of limitations on credit or refund and that he relied on their statements to his detriment.

CONCLUSIONS OF LAW

A. As relevant to this proceeding, Tax Law § 687, entitled "Limitations on credit or refund" provides as follows:

> (a) General. --- Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later. . . . If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return. . . . If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately proceeding the filing of the claim. . . .

B. For the years at issue, petitioner's payment of taxes was via tax withheld from wages, refund offsets and numerous payments pursuant to the income execution. Pursuant to Tax Law § 687(i), income taxes withheld from wages for 1991 and 1992 are deemed to have been paid by a taxpayer on April 15th of the following year, i.e., April 15, 1992 for the 1991 tax year and April 15, 1993 for the 1992 tax year. Accordingly, in order to be entitled to a refund of any of the tax

withheld from wages, petitioner would be required, pursuant to Tax Law § 687(a), to file a claim for such refund by April 15, 1995 for 1991 and April 15, 1996 for 1992. With respect to the payments made by petitioner pursuant to the refund offsets and income execution, Tax Law § 687(a) requires that any claim for refund of these payments would have to be filed within two years of the date of payment. In the instant matter, it is clear that the Division had no record of petitioner's having filed New York State and City personal income tax returns for 1991 and 1992 at any time prior to April 13, 2004 and that petitioner first made a claim for refund for 1991 and 1992 on April 13, 2004.

C. Tax Law § 691(a) provides, in pertinent part, that:

> If any return . . . required to be filed . . . within a prescribed period or on or before a prescribed date . . . is, after such period or such date, delivered by United States mail . . . the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. . . . If any document or payment is sent by United States registered mail, such registration shall be prima facie evidence that such document or payment was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed.

When the Division fails to receive a document, the general rule is that proof of ordinary mailing is insufficient as a matter of law to prove timely filing (***Matter of Dattilo,*** Tax Appeals Tribunal, May 11, 1995, ***confirmed Dattilo v. Urbach,*** 222 AD2d 28, 645 NYS2d 352; ***Matter of Schumacher,*** Tax Appeals Tribunal, February 9, 1995; ***Matter of Reeves***, Tax Appeals Tribunal, August 22, 1991; ***Matter of Savadjian***, Tax Appeals Tribunal, December 28, 1990).

D. In the instant matter, I am satisfied that the Division has conducted an adequate search of its records in an effort to locate the 1991 and 1992 returns allegedly mailed on or before April 15, 1992 and April 15, 1993 and that it has no record of ever receiving these returns. Since the Division's records reflect that the first time it received petitioner's returns and claims for refund for 1991 and 1992 was on April 13, 2004, the burden is on petitioner to prove (Tax Law

§ 689[e]), by one means or another, that he filed his returns and claims for refund for 1991 and 1992 with the Division before the statute of limitations for refund had expired. Mr. Paige's testimony concerning the mailing of his 1991 and 1992 returns, although forthright and sincere, is not sufficient to permit a conclusion that petitioner has met his burden of proving that the returns for 1991 and 1992 were filed (delivered) with the Division on or before April 15, 1992 and April 15, 1993, respectively (***see*, *Matter of Dattilo, supra*; *Matter of Schumacher, supra;* *Matter of Miller v. United States***, 784 F2d 728, 86-1 US Tax Cas ¶ 9261; ***Matter of Sipam***, Tax Appeals Tribunal, March 10, 1988 [for a general discussion on the filing of various documents with the Division and the Division of Tax Appeals]).

E. Petitioner could have avoided any risk of mishandling of the 1991 and 1992 returns by the Postal Service or by the Division had he used certified or registered mail (Tax Law § 691[a]; 20 NYCRR 2399.2[b]), since certification or registration serves as prima facie evidence that a document or payment was delivered. However, petitioner chose to mail his returns for 1991 and 1992 using ordinary first class mail and therefore he bore the risk of nondelivery or mishandling. It is noted that when issuing a Notice of Deficiency or Notice of Disallowance to a taxpayer, the Division is required to send the notices by certified or registered mail (Tax Law § 681[a]; § 689[c][3]) to ensure delivery. Accordingly, I see no inequity in the statute since it places the same mailing requirements on a taxpayer to ensure delivery of a document to the Division.

F. While Tax Law § 687(a) provides for a three-year statute of limitations to claim a refund, it must be noted that the Division, once a return has been filed, generally has a like three-year period to issue a Notice of Deficiency to a taxpayer asserting that additional taxes are due. Therefore, it cannot be found that the statutory scheme is unfair since it provides both parties with the same three-year time frame. Both the Tax Appeals Tribunal, in ***Matter of Jones***

(January 9, 1997), and the Appellate Division, in ***Matter of Brault v. Tax Appeals Tribunal*** (265 AD2d 700, 696 NYS2d 579), have upheld the validity of applying the three-year statute of limitations for refund in cases with facts similar to those found in the instant matter. By establishing time frames for the issuance of notices of deficiency and the filing of claims for refund, the Tax Law provides both the State of New York and its taxpayers with the financial stability and security that comes from knowing that a specific tax year is closed.

G. Petitioner's argument that he relied to his detriment on incomplete advice he received from the Division's employees is not supported by any credible evidence. To the contrary, the record is replete with evidence that the Division continuously advised petitioner to submit his returns for 1991 and 1992 along with his wage and tax statements and petitioner, for whatever reason, simply chose to ignore the requests. The eventual outcome of these actions resulted in petitioner's submitting his claims for refund past the applicable statute of limitations for credit or refund with respect to the $12,140.46 he overpaid for 1991 and 1992.

H. While it is unfortunate that petitioner cannot be granted a refund of the overpayment he made for 1991 and 1992 because of the expiration of the statute of limitations for credit or refund, such conclusion is within the clear mandate of the statute. Tax Law § 687(e) specifically provides that:

> Failure to file claim within prescribed period.--- No credit or refund shall be allowed or made, except as provided in subsection (f) of this section or subsection (d) of section six hundred ninety, after the expiration of the applicable period of limitations specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under this article.

I. The petition of Barry S. Paige is denied and the Division's Notice of Disallowance dated May 7, 2004 is sustained.

DATED: Troy, New York
March 23, 2006

/s/ James Hoefer
PRESIDING OFFICER